1300 Pennsylvania Avenue, NW
Washington, DC 20229

U.S. Customs and Border Protection

OT: RR: RDL: DLJA
CBP-AP-2021-090566 MAP

September 10, 2021

(b) (6)

Re: Freedom of Information Act Appeal of CBP-2020-078200

Dear (b) (6)

This is in response to your correspondence submitted electronically and dated June 2, 2021, and received by my office on August 3, 2021, appealing the May 28, 2021 decision of the Freedom of Information Act (FOIA) Division, Privacy and Diversity Office, U.S. Customs and Border Protection (CBP). By this letter, your appeal is granted in part, and we release some previously redacted information. We additionally conclude that FOIA Division did not conduct a complete and adequate search, but find that a more thorough search did not uncover any additional records responsive to your request.

I. Your FOIA Request and Appeal

In your initial request, you indicated "[o]n 3 September 2020, the U.S. Border Patrol posted to its YouTube channel a video called 'The Gotaway.' It is available here: https://youtu.be/0aErN." You requested "all records related to this video," including, "without limitation":

1. "its conceptualization, creation, and development;
2. all contracts related to the video;
3. all internal and external communications related to the video (e.g. emails, memoranda, letters, text messages);
4. all photographs, video, and other records generated in the creation of 'The Gotaway,' regardless of whether they were ultimately included in the final video itself."

On May 28, 2021, FOIA Division issued a response to your request indicating that "CBP-2020-078200 has been processed with the following final disposition: Partial Grant/Partial Denial." FOIA Division determined that 47 pages of records were responsive to your FOIA request, released four pages of records in full, and withheld certain information in 43 pages of records as exempt from disclosure, pursuant to FOIA Exemptions (b)(5), (b)(6), (b)(7)(C), and (b)(7)(E). FOIA Division did not provide any additional information. The FOIA Division decision also indicated that "[t]his completes the CBP response to your request."

You challenge FOIA Division's determination on two grounds. First, you requested a *de novo* review of all redactions, and asked that we specifically review the redactions on pages 21 and 25 – 31 of the e-mail production. Second, you argued that FOIA Division's search for records was "deficient" and specifically identified six ways that you believed it should be found lacking:

1. "The CBP emails refer to inquiries about the Gotaway video from Congressional offices. But no records of those Congressional inquiries were produced. If the Congressional inquiries were made in the form of a record, or if they generated any records in response, those should have been produced.

2. The CBP emails state that the Gotaway video was posted on YouTube, Facebook, Twitter, and Instagram. (See Pages 1 and 29 of CBP's email production.) None of those posts were produced, other than a screenshot from Instagram that was taken and sent to CBP by Caitlin Dickson, a Yahoo News reporter covering the story. They should have been.

3. As Ms. Dickson notes, the CBP lnstagram post tagged a number of conservative media outlets, including Breitbart, The Blaze, Epoch Times and the Daily Caller. (See Page 41 of CBP's email production.) All records related to this decision should have been produced.

4. The Gotaway video itself is a record, but neither the final version nor any of the intermediate versions of the video were produced. They should have been.

5. If any CBP employee was admonished, warned, or disciplined in relation to the Gotaway video, related records should have been produced.

6. The CBP emails indicate that CBP took the Gotaway video offline on or around September 9, 2020 due to copyright issues, with the intention of reposting it once those issues were resolved. (See Pages 1-2 of CBP's email production.) But on or around September 23, CBP Chief Rodney Scott directed that the Gotaway video

be removed from all social media entirely, both at the HQ level and at the ELC Sector level. All records related to that decision should have been produced."

As such, we interpret your appeal to mean that you are challenging the redactions made by FOIA Division to the records initially released and the search undertaken by FOIA Division to identify records responsive to your request. We address each in turn.

II. FOIA Division Overredacted Some Releasable Information

You first challenge requested a review of all redactions made to the records FOIA Division released. In response, we reviewed each of the redactions FOIA Division made to the 47 pages of records released to you in response to your initial request. As a result of this examination, we removed some redactions effectuated by FOIA Division on pages 16, 21, 29, and 39. We affirm the remaining redactions.

The FOIA "was enacted to facilitate public access to Government documents." *U.S. Dep't of State v. Ray,* 502 U.S. 164, 173 (1991). The predominant objective of the FOIA is the disclosure of executive branch information that is maintained by the Federal Government to the public unless the requested records contain certain categories of information that are exempt or excluded from compelled disclosure. FOIA provides nine exemptions and three exclusions pursuant to which an agency may withhold requested information. Thus, the public's right to government information is not without limits. However, FOIA exemptions are to be narrowly construed, and the burden is on the government to demonstrate that the materials sought may be withheld due to one or more of the exemptions.

In any event, the FOIA provides that any non-exempt information that is reasonably segregable from the requested records must be disclosed. The segregability requirement limits claims of exemption to discrete units of information; to withhold an entire document, all units of information in that document must fall within a statutory exemption. See *Trans-Pac. Policing Agreement v. U.S. Customs Serv.,* 177 F. 3d 1022, 1027 (D.C. Cir. 1999). Further, the FOIA does not obligate agencies to create or retain documents nor require an agency to produce information that does not exist in record form or create a document that answers a requester's questions. See *Frank v. U.S. Dep't of Justice,* 941 F. Supp. 4, 5 (D.D.C. 1996); *Kissinger v. Reporters Committee for Freedom of the Press,* 445 U.S. 136, 152 (1980).

After a thorough review, we conclude that FOIA Division overredacted some information that should have been released to you and we have removed those redactions from the attached records. In other cases, we affirm FOIA Division's determinations and continued to withhold some information pursuant to Exemptions (b)(5), (b)(6), (b)(7)(C), and (b)(7)(E), as described below.

A. Redactions Made to Protect Privileged Information Pursuant to Exemption (b)(5)

Exemption (b)(5) protects "inter-agency or intra-agency memorandums or letters, or portions thereof, that are normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975). Exemption (b)(5) encompasses both statutory privileges and those commonly recognized by case law. *U.S. v. Weber Aircraft Corp.*, 465 U.S. 792 (1984). The privileges incorporated into this exemption pertain to an agency's decision-making process (*i.e.*, the deliberative process privilege), the attorney work-product privilege, and the attorney-client privilege. In this case, the deliberative process, attorney work-product, and attorney-client privileges are all applicable; thus, discussion of these privileges follows.

Specifically, FOIA Division utilized FOIA Exemption (b)(5) to protect attorney-client privileged communications and attorney work-product starting on page 26 through page 28 of the released email records. The information consists of confidential communications between representatives from U.S. Border Patrol, the Office of Professional Responsibility (OPR), and the Office of Chief Counsel (OCC). These include the request and provision of legal advice and opinions on copyright and other legal issues regarding "The Gotaway" video as well as attorney work-product prepared by the OCC attorney in contemplation of possible civil litigation regarding possible copyright violations. Information on pages 30 through 31 (and again on page 39, which is duplicate information in that the email contains portions of an email chain that duplicate information in the email on pages 29 through 31) was also redacted under Exemption (b)(5) and consists of information protected under the deliberative process privilege.

i. Redactions Made to Protect the Deliberative Process Privilege

The deliberative process privilege is designed to protect the "decision making processes of government agencies." *NLRB,* 421 U.S. at 150; see also *Elec. Frontier Found. v. DOJ,* 739 F.3d 1, 7 (D.C. Cir. 2014) (protecting documents that "'compris[e] part of a process by which governmental decisions and policies are formulated'" (quoting *Pub. Citizen v. OMB,* 598 F.3d 865, 875 (D.C. Cir. 2010))); *Lahr v. NTSB,* 569 F.3d 964, 982 (9th Cir. 2009) (stating that exposure of "internal deliberations . . . would discourage candid discussion and effective decisionmaking"); *ACLU v. DHS,* 738 F. Supp. 2d 93, 110 (D.D.C. 2010) (holding that agency properly withheld documents so as not to discourage the candid exchange of ideas and analysis required to conduct thorough investigation); *AFGE v. Broad. Bd. of Governors,* 711 F. Supp. 2d 139, 156 (D.D.C. 2010) (protecting emails that reflect internal deliberations of agency employees because release would reveal employees' preliminary thoughts and approaches). This privilege protects not merely documents, but also the integrity of the deliberative process itself where the exposure of that process would result in harm. See *NLRB*, 421 U.S. at 151; *Greenberg v. U.S. Dep't of Treasury,* 10 F.Supp.2d 3, 16, n. 19 (D.D.C. 1998); *Dudman Communications Corp. v. Dep't of the Air Force,* 815 F.2d 1565, 1568 (D.C.Cir. 1987). Within the context of the deliberative process privilege, "Congress ... intend[ed] ... to include [nearly any record] that is part of the deliberative process." *Ryan v. Dep't of Justice*, 617 F.2d 781, 790 (D.C.Cir. 1980).

The general purpose of this privilege is to "prevent injury to the quality of agency decisions." *NLRB*, 421 U.S. at 151. Specifically, three policy purposes consistently have been held to constitute the bases for this privilege: (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action. See, e.g., *Russell v. Dep't of the Air Force,* 682 F.2d 1045, 1048 (D.C. Cir. 1982); *Coastal States Gas Corp. v. DOE,* 617 F.2d 854, 866 (D.C. Cir. 1980); *Kidd v. DOJ,* 362 F. Supp. 2d 291, 296 (D.D.C. 2005) (protecting documents on basis that disclosure would "inhibit drafters from freely exchanging ideas, language choice, and comments in drafting documents") (internal quotation marks omitted); *Heggestad v. DOJ,* 182 F. Supp. 2d 1, 12 (D.D.C. 2000) (protecting memoranda containing recommendations based on perjured testimony, finding that they "have no probative value to the public since they are based on misrepresentations"). As long as a document is generated as part of a continuing process of agency decision making, Exemption (b)(5) is applicable. However, this privilege is not absolute, but rather exists in a temporal, pre-decisional state; thus, recommendations of no precedential value or applicability to rights of individual members of the public lose protection if specifically adopted as the basis for a final decision. See *Afshar v. Dep't of State,* 702 F.2d 1125, 1142-43 (D.C. Cir. 1983); *Tax Analysts v. IRS,* 117 F.3d 607, 617 (D.C. Cir. 1997) (certain memoranda are not predecisional documents, because they constitute "statements of an agency's legal position").

In applying Exemption (b)(5), the threshold issue is whether the information is of the type to be covered by the phrase "inter-agency or intra-agency memorandums." *Dep't of the Interior v. Klamath Water Users Protective Ass'n,* 532 U.S. 1 (2001). Passing this threshold, the requirements for applying the deliberative process privilege are whether the information is predecisional in time and deliberative in process (*i.e.*, are part of policy-formulation process). See *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993); *Delta Ltd. v. U.S. Customs & Border Prot. Bureau*, 384 F. Supp. 2d 138, 151-52 (D.D.C. 2005) (finding that factual portions of records were too closely mixed in with deliberative portions and therefore were not releasable).

In this case, information on pages 30 and 31 (and again on page 39) of the responsive records, specifically an intra-agency email communications between Border Patrol and OPR staff and management with proposed analysis and recommendations by OPR regarding compliance with CBP policies and “The Gotaway” video, is predecisonal in time and deliberative in process. The records reflect CBP’s consideration of proposed analysis and recommendations for compliance with CBP policies that were either not ultimately part of the final decision or proposed during the deliberative process before a final decision was rendered and are part of the decisional thought process in assessing compliance with CBP policies. See *Mapother*, 3 F.3d at 1537; *Delta*, 384 F. Supp. at 151-52. Accordingly, this information contained on pages 30 and 31 (and again on page 39) of the responsive records is exempt from disclosure pursuant to FOIA Exemption (b)(5).

ii. Redactions Made to Protect the Attorney Work Product and Attorney-Client Confidential Communication Privileges

The attorney work-product privilege protects documents and other memoranda prepared by an attorney in contemplation of litigation. As its purpose is to protect the adversarial trial process by insulating the attorney's preparation from scrutiny, the work-product privilege ordinarily does not attach until at least "some articulable claim, likely to lead to litigation," has arisen. The privilege "extends to documents prepared in anticipation of foreseeable litigation, even if no specific claim is contemplated." See *Schiller v. NLRB,* 964 F.2d 1205, 1208 (D.C. Cir. 1992). The privilege also has been held to attach to records of law enforcement investigations, when the investigation is "based upon a specific wrongdoing and represent[s] an attempt to garner evidence and build a case against the suspected wrongdoer." The privilege is not limited to civil proceedings, but rather extends to administrative proceedings. Further, there are no aspects of this document that are disclosable, as once this privilege is found to exist, segregability is not required. See *Judicial Watch, Inc., v. U.S. Dep't of Justice,* 432 F.3d 366, 371-372 (D.C.Cir. 2005).

The attorney-client privilege concerns "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice." *Mead Data Cent., Inc. v. U.S. Dep't of the Air Force,* 566 F.2d 242, 252 (D.C. Cir. 1977); see also *Rein v. U.S. Patent and Trademark Office,* 553 F. 3d 353, 377 (4th Cir. 2009) (noting confidentiality requirement for privilege). Although the privilege fundamentally applies to facts divulged by a client to his attorney, this privilege "also encompasses any opinions given by an attorney to his client based upon, and thus reflecting, those facts." *Elec. Privacy Info. Ctr. v. DHS,* 384 F. Supp. 2d 100, 114 (D.D.C. 2005); see, e.g., *Jernigan v. Dep't of the Air Force,* No. 97-35930, 1998 WL 658662, at *2 (9th Cir. Sept. 17, 1998)(holding that agency attorney's legal review of internal agency "Social Action" investigation "falls squarely within the traditional attorney-client privilege"); *Schlefer v. United States,* 702 F.2d 233, 244 n.26 (D.C. Cir. 1983) (observing that privilege "permits nondisclosure of an attorney's opinion or advice in order to protect the secrecy of the underlying facts"); *W & T Offshore, Inc. v. U.S. Dep't of Commerce,* No. 03-2285, 2004 WL 2115418, at *4 (E.D. La. Sept. 21, 2004)(applying privilege to documents reflecting confidential communications where agency employees requested legal advice or agency counsel responded to those requests).

The privilege typically involves a single client, even where the "client" is an agency, and his, her, or its attorneys, as well as in situations where there are multiple clients who share a common interest. The D.C. Circuit has held that confidentiality may be inferred when the communications suggest that "the government is dealing with its attorneys as would any private party seeking advice to protect personal interests," *Coastal States Gas Corp. v. DOE,* 617 F.2d 854, 863 (D.C. Cir. 1980)), but in other cases it, as well as other courts, have required the government to demonstrate the confidentiality of the attorney-client communications. See *Maine v. U.S. Dep't of the Interior,* 298 F.3d 60, 71-72 (1st Cir. 2002) (amended opinion) (holding that district court did not err in finding privilege inapplicable where defendants failed to show confidentiality of factual communications);

Mead Data, 566 F.2d at 252-53 (requiring government to make affirmative showing of confidentiality for privilege to apply). In *Upjohn Co. v. United States,* the Supreme Court held that the attorney-client privilege covers attorney-client communications when the specifics of the communication are confidential, even though the underlying subject matter is known to third parties. 449 U.S. at 395-96; see also *United States v. Cunningham,* 672 F.2d 1064, 1073 n.8 (2d Cir. 1982) ("[W]e do not suggest that an attorney-client privilege is lost by the mere fact that the information communicated is otherwise available to the public. The privilege attaches not to the information but to the communication of the information."); *In re Diet Drugs Prods. Liability Litig.,* No. 1203, 2000 WL 1545028, at *5 (E.D. Pa. Oct. 12, 2000) ("While the underlying facts discussed in these communications may not be privileged, the communications themselves are privileged."); *In re Ampicillin Antitrust Litig.,* 81 F.R.D. 377, 388 (D.D.C. 1978)(holding that privilege applies even where information in question was not confidential, so long as client intended that information be conveyed confidentially). The Supreme Court in *Upjohn* concluded that the privilege encompasses confidential communications made to the attorney not only by decisionmaking "control group" personnel, but also by lower-level employees. 449 U.S. at 392-97.

In this case, the various intra-agency email communications (page 26 through page 28 of the released email records) between a CBP Office of Chief Counsel (OCC) attorney and Border Patrol and OPR staff and management consist of confidential communications between Border Patrol and OPR employees requesting legal advice and opinions on copyright and other legal issues regarding “The Gotaway” video and the OCC attorney who responded to those requests. See *Mead Data,* 566 F.2d at 252; *Elec. Privacy Info. Ctr.,* 384 F. Supp. 2d at 114; *Jernigan,* 1998 WL 658662, at *2; *Schlefer,* 702 F.2d at 244 n.26; *W & T Offshore,* 2004 WL 2115418, at *4; *Cujas,* 1998 WL 419999, at *6. In addition, the email was prepared by a government attorney in contemplation of possible civil litigation regarding possible copyright violations. See *Schiller,* 964 F.2d at 1208. Thus, the information was properly withheld pursuant to FOIA Exemption (b)(5).

B. Redactions Made to Protect the Personal Privacy Interests of CBP Employees and Third Parties Pursuant to Exemptions (b)(6) and (b)(7)(C)

Exemptions (b)(6) and (b)(7)(C) both relate to protecting personal privacy and have been applied here to protect identifying information (PII) of CBP employees and third parties identified and mentioned in the records, specifically the names, telephone numbers, and other contact information of the individuals, as well as other information in addition to PII where identities of individuals would be made apparent by certain detailed information in the record and its context. Under the FOIA, privacy encompasses the “individual’s control of information concerning his or her person.” *Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763 (1989). Exemption 6 protects “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). Exemption (b)(7)(C) excludes records or information compiled for law enforcement purposes, but only to the extent that the production of such materials “could reasonably

be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C).

As a threshold requirement, Exemption (b)(6) can only be applied to "personnel and medical and similar files." 5 U.S.C. § 552(b)(6). However, the range of documents falling within these categories is interpreted broadly so as to include all government records "which can be identified as applying to that individual." *Dep't of State v. Washington Post*, 456 U.S. 595, 602 (1982) (quoting H. R. Rep. No. 1497, 89th Cong., 2nd Sess., 11 (1966)). In other words, all information that "applies to a particular individual," *i.e.*, PII such as a person's name, address, phone number, date of birth, criminal history, medical history, and social security number, meets the threshold requirement for Exemption (b)(6) protection as privacy interests cognizable under the FOIA are found to exist in such PII. In this case, FOIA Division staff redacted names, telephone numbers, and other contact information of CBP employees and third parties mentioned and identified in the records**,** as well as other information in addition to PII where identities of individuals would be made apparent by certain detailed information in the record and its context. The PII and other information, such as duty location and information about the death of a law enforcement employee, could offer enough detail to reveal the identity of the individuals mentioned and identified in the records. Such information applies to the individual third parties mentioned in the record. See *Washington Post*, 456 U.S. at 602. Once the threshold is met, Exemption (b)(6) requires a balancing of the public's right to know against an individual's right to privacy to determine whether disclosure of the records at issue would constitute a clearly unwarranted invasion of a person's privacy. *Reporters Comm. for Freedom of the Press*, 489 U.S. at 762; *Dep't of the Air Force v. Rose,* 425 U.S. 352, 372-73 (1976). That balance can be properly struck where "personal references or other identifying information [are] deleted." *Rose*, 425 U.S. at 380. In order to compel release of materials, there must be a public interest because "something, even a modest privacy interest outweighs nothing every time." *Nat'l Ass'n of Retired Fed. Employees v. Horner,* 879 F.2d 873, 879 (D.C. Cir. 1989).

The privacy interests to be protected in this case concern the PII of CBP employees and third parties mentioned in the record, to include the names, telephone numbers, and other contact information, as well as other information in addition to PII where identities of individuals would be made apparent by certain detailed information in the record and its context. Such individuals have a clear expectation of privacy. See *Pons v. U.S. Customs Serv.,* 1998 U.S. Dist. LEXIS 6084 (D.D.C. 1998). In this regard, the privacy consideration is to protect CBP employees from unnecessary "harassment and annoyance in the conduct of their official duties and in their private lives," which could conceivably result from the public disclosure of their identity. *Nix v. U.S.*, 572 F.2d 998, 1006 (4th Cir. 1978). Further, the privacy interests include the avoidance of reprisals and embarrassment caused by being mentioned in law enforcement and investigative records and in keeping personal information private. See *Barnard,* 598 F.Supp. 2d at 12 (individuals have a privacy interest in avoiding "unnecessary, unofficial questioning, harassment and stigmatization"). In addition, as personnel of a "security agency," the CBP employees mentioned in the records have a substantial privacy interest in their information not being released to the public. See 5 CFR 293.311; Memorandum from

CBP Acting Commissioner Mark Morgan, *All CBP Designated as a Security Agency under Office of Personnel Management* (January 31, 2020).

The privacy interest includes the use to which such information could be put, as disclosure to one is disclosure to all. In order to compel release of this information, there must be a public interest because "something, even a modest privacy interest outweighs nothing every time." See *Horner,* 879 F.2d at 879; *Cappabianca v. Commissioner, United States Customs Service,* 847 F. Supp. 1558, 1564 (M.D. Fla. 1994). In this case, no identifiable public interest in this information has been asserted by you. Without any genuine public interest, there is little reason to disclose the withheld PII that could identify individuals mentioned in the records, to include the names, telephone numbers, and other contact information of CBP employees and third parties mentioned and identified in the records, as well as other information in addition to PII where identities of individuals would be made apparent by certain detailed information in the record and its context. See *id.* We further find that the individual's right to privacy outweighs whatever public interest, if any, might exist in knowing the information such as the individuals' identities. See *Reporters Comm. for Freedom of the Press*, 489 U.S. at 762; *Rose*, 425 U.S. at 380. Moreover, disclosing the information redacted from the documents in this case, *i.e.,* the names, telephone numbers, and other contact information (as well as other information in addition to PII where identities of individuals would be made apparent by certain detailed information in the record and its context), that could identify CBP employees and third parties, is unlikely to further the goals of the FOIA, namely "to open agency action to the light of public scrutiny." *Rose*, 425 U.S. at 372. Accordingly, the withheld PII (the names, telephone numbers, and other contact information of CBP employees and third parties mentioned and identified in the records, and other information in addition to PII where identities of individuals would be made apparent by certain detailed information in the record and its context) are properly withheld under the provisions of Exemption (b)(6).

In addition to the application of Exemption (b)(6), Exemption (b)(7)(C) is also utilized in withholding this portion of the documents from disclosure. Exemption (b)(7)(C) exempts from disclosure "records and information compiled for law enforcement purposes" the disclosure of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552 (b)(7)(C). This exemption applies to civil, criminal, and administrative law enforcement proceedings, and protects, among other information, the identity of law enforcement personnel and third parties referenced in files compiled for law enforcement purposes. The primary consideration is to protect CBP and other law enforcement agency employees as individuals from unnecessary, unofficial questioning and harassment as to the conduct of their duties. *Nix v. United States,* 572 F.2d 998, 1006 (4th Cir. 1978*)*. In addition, as noted, as personnel of a "security agency," the CBP employees mentioned in the records have a substantial privacy interest in their information not being released to the public. See 5 CFR 293.311; Memorandum from CBP Acting Commissioner Mark Morgan, *All CBP Designated as a Security Agency under Office of Personnel Management* (January 31, 2020). Exemption (b)(7)(C) is also intended to protect third parties whose identities are revealed in law enforcement files

from comment, speculation and stigmatizing connotation associated with being identified in a law enforcement record.

Although the protections available under Exemption (b)(7)(C) are not the same as Exemption (b)(6), the analysis is the same, requiring the balancing of the privacy interests involved against the public interest in disclosure. *Lewis v. Dep't of Justice*, 609 F.Supp.2d 80, 84 (D.D.C. 2009). However, because Exemption (b)(7)(C) contains broader protections than Exemption (b)(6)[1], the two Exemptions differ in the "magnitude of the public interest that is required" to overcome the privacy interests involved, with an extra thumb on scale in favor of redaction once Exemption (b)(7)(C) privacy issues are implicated. *Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 496 n.6 (1994).

Like Exemption (b)(6), Exemption (b)(7)(C) has also been found to protect the privacy interests of all persons mentioned in law enforcement records, including investigators, suspects, witnesses, and informants. *Lewis*, 609 F. Supp. 2d at 84. The privacy interest at play under Exemption (b)(7)(C) in protecting the CBP employee and third-party information located in law enforcement documents is so strong, though, that courts have found that such information is "categorically exempt" from production "unless access to the names and addresses of private individuals… is necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity." *SafeCard Services, Inc. v. U.S. Sec. & Exchange Comm'n.*, 926 F.2d 1197, 1206 (D.C. Cir. 1991).

Once the threshold requirement that the information be found in "law enforcement" records is met[2] and the privacy interests described in Exemption (b)(7)(C) are triggered, the onus shifts to the requester to show government misconduct. *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004). That showing must be "more than a bare suspicion" of official misconduct – it must "warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." *Id*. at 174. Otherwise, the balancing requirement does not come into play. *Boyd v. Dep't of Justice*, 475 F.3d 381, 388 (D.C. Cir. 2007).

In this case, having determined the information found in question to be located in a law enforcement record and without any evidence indicating misconduct, all PII of CBP employees and third parties mentioned in the records (to include the names, telephone numbers, and other contact information, as well as other information in addition to PII where identities of individuals would be made apparent by certain detailed information in

[1] Exemption (b)(7)(C)'s privacy language is broader than the comparable language in Exemption (b)(6) in two respects. First, whereas Exemption (b)(6) requires that the invasion of privacy be "clearly unwarranted," the adverb "clearly" is omitted from Exemption (b)(7)(C). Second, whereas Exemption (b)(6) refers to disclosures that "would constitute" an invasion of privacy, Exemption (b)(7)(C) encompasses any disclosure that "could reasonably be expected to constitute" such an invasion. *Reporters Comm. for Freedom of the Press*, 489 U.S. at 762.

[2] It is well established that CBP has a law enforcement mandate. *Coastal Delivery Corp. v. U.S. Customs Serv.*, 272 F. Supp. 2d 958, 963 (C.D. Cal. 2003). The records in this case were compiled in CBP's ongoing efforts to enforce the border and immigration laws of this country and to protect this country from outside threats. The records are therefore in clear furtherance of that law enforcement mandate.

the record and its context) have been redacted. Moreover, there is no public interest to be served in this case by placing the identity of CBP employees and third parties mentioned in the records before the public. Thus, we conclude that Exemption (b)(7)(C) is applicable to withhold the information from disclosure.

C. Redactions Made to Protect Unknown Law Enforcement Techniques and Procedures

Information was also withheld under Exemption (b)(7)(E). Specifically, FOIA Division withheld law enforcement techniques, procedures, and guidelines used by CBP in the course of investigations or border security or immigration enforcement (to include information which would reveal the scope and focus of certain law enforcement techniques and investigations; techniques, procedures, and guidelines regarding the use of law enforcement databases, including the names of systems, the types of information sought, and how that information is processed and used; techniques and procedures for notification and coordination so law enforcement information is properly shared with management; techniques for identifying and investigating violations of law; and information regarding Border Patrol equipment and capabilities and particular types of resources utilized, including the type of equipment and location.

Exemption (b)(7)(E) exempts material that was compiled for law enforcement purposes and that would disclose the "techniques and procedures" or "guidelines" for "law enforcement investigations or prosecutions." 5 U.S.C. § 552(b)(7)(E). Application of this exemption is limited, however, to cases in which disclosure "could reasonably be expected to risk circumvention of the law." *Id*. Information that falls within Exemption (b)(7)(E)'s purview is "categorically exempt" from disclosure. *Fisher v. Dep't of Justice*, 772 F.Supp. 7, 12 at n. 9 (D.D.C. 1991). The threshold requirement is that the information be found in "law enforcement" records. The records in contention in this case (emails detailing USBP's projects, operations, and activities, and revealing techniques, procedures, and guidelines regarding the enforcement techniques and procedures utilized by Border Patrol in its investigations of potential border security and immigration violations) were compiled in furtherance of CBP's ongoing efforts to enforce the border security and immigration laws of this country and to protect this country from outside threats. The records are therefore in clear furtherance of that law enforcement mandate.

With regard to whether disclosure "could reasonably be expected to risk circumvention of the law," FOIA Division staff redacted specific law enforcement techniques, procedures, and guidelines used or followed by CBP in the course of investigations or border security or immigration enforcement, such as information which would reveal the scope and focus of certain law enforcement techniques and investigations; techniques, procedures, and guidelines regarding the use of law enforcement databases, including the names of systems, the types of information sought, and how that information is processed and used; techniques and procedures for notification and coordination so law enforcement information is properly shared with management; techniques for identifying and investigating violations of law; and information regarding Border Patrol equipment and capabilities and particular types of resources utilized, including the type of equipment and location.

The redacted material reveals a great deal of information related to the law enforcement techniques, procedures, and guidelines that may be used when evaluating and handling threats at U.S. borders. These law enforcement techniques, procedures, and guidelines have been withheld in order to protect CBP's methods in detecting, deterring, evaluating, and processing potential threats at the United States' borders. Although you may not seek this information for nefarious purposes, "it would appear obvious that those immediately and practically concerned with such matters would be individuals embarked upon clandestine and illicit operations, the detection of which would be frustrated if they were privy to the methods employed… to ferret them out." *Caplan v. Bureau of Alcohol, Tobacco & Firearms*, 587 F.2d 544, 547 (2d Cir. 1978). See also *Buffalo Evening News, Inc. v. U.S. Border Patrol*, 791 F. Supp. 386, 393 (W.D.N.Y. 1992) (protecting records that "would clearly disclose the USBP's techniques for apprehending excludable aliens"). Disclosure of this information would enable potential violators to design strategies to circumvent the investigative and examination procedures developed and employed by CBP in its mission to secure the border and enforce immigration laws by allowing potential violators to better prepare themselves to evade and exploit U.S. immigration and border security laws. Therefore, this information is properly withheld pursuant to Exemption (b)(7)(E).

Information was also withheld under Exemption (b)(7)(E) relating the access location of law enforcement systems and records. This information was withheld to protect CBP's methods for categorizing, identifying, and processing law enforcement records as its release would enable potential violators to design strategies to circumvent the investigative and examination procedures developed and employed by CBP in its law enforcement mission by creating a potential compromise of law enforcement databases through technology-based attacks and could allow individuals to identify and potentially access law enforcement systems and records without authorization, thereby circumventing the law. Therefore, this information is properly withheld pursuant to Exemption (b)(7)(E).

III. FOIA Division's Search Was Lacking in Several Respects, but a More Thorough Search Did Not Identify Any New Records

The FOIA provides that "the term 'search' means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request." 5 U.S.C. § 552(a)(3)(D). Generally, courts require agencies to undertake a search that is "reasonably calculated to uncover all relevant documents." See *Williams v. Dep't of Justice,* 177 F. App'x 231, 233 (3d Cir. 2006) (recognizing that an agency "has a duty to conduct a reasonable search for responsive records" (citing *Oglesby v. Dep't of the Army,* 920 F.2d 57, 68 (D.C. Cir. 1990))). Further, "the adequacy of a FOIA search is generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry out the search," and the adequacy of an agency's search is judged by a test of "reasonableness," which will vary from case to case. See *Jennings v. Dep't of Justice,* 230 F. App'x 1, 1 (D.C. Cir. 2007) (quoting *Iturralde v. Comptroller of Currency,* 315 F.3d 311, 315 (D.C. Cir. 2003)); *Zemansky v. Env't Prot. Agency,* 767

F.2d 569, 571-73 (9th Cir. 1985) (observing that the reasonableness of an agency search depends upon the facts of each case (citing *Weisberg v. Dep't of Justice,* 705 F.2d 1344, 1351 (D.C. Cir. 1983)).

Courts have found searches to be reasonable when, among other things, they are based on a reasonable interpretation of the scope of the subject matter of the request or when it focused on the records specifically mentioned in the request. See *Larson v. Dep't of State,* 565 F.3d 857, 869 (D.C. Cir. 2009) (affirming adequacy of search based on agency's reasonable determination regarding records being requested and searched accordingly). The reasonableness of an agency's search can depend on whether the agency properly determined where responsive records were likely to be found and searched those locations. See *Lechliter v. Rumsfeld,* 182 F. App'x 113, 115 (3d Cir. 2006) (concluding that agency fulfilled duty to conduct a reasonable search when it searched two offices that it "determined to be the only ones likely to possess responsive documents" (citing *Oglesby,* 920 F.2d at 68)); *Elec. Privacy and Info. Ctr. v. Fed. Bureau of Investigation,* No. 17-00121, 2018 WL 2324084, at *3 (D.D.C. May 22, 2018) (finding search adequate where FBI searched, based on consultation with subject-matter experts, location where the FBI would store responsive records); *James Madison Project v. Cent. Intel. Agency,* 605 F. Supp. 2d 99, 108 (D.D.C. 2009) (concluding that "search method could reasonably be expected to produce the information requested" because all agency regulations requested were maintained in one records system and agency searched that system for responsive records).

In response to your appeal, an attorney on my staff and I reviewed the steps taken by FOIA Division staff to respond to your initial request. In response to your initial request, FOIA Division staff contacted staff at USBP to conduct a search for records that pertain to your request. Within CBP, USBP secures our borders by detecting and preventing the entry of illegal aliens and outside threats and reducing the likelihood that dangerous people and capabilities enter the United States between the ports of entry. USBP has purview over the video and the records you requested relating to the video. It was the most appropriate office to consult regarding your request.

FOIA Division contacted USBP staff, with expertise and knowledge of their office's programs, operations, and policies, to conduct a search for records that pertain to your request. USBP staff, including El Centro Sector staff with expertise and knowledge of the video and their office's programs, operations, and policies, conducted a search of email files and USBP and Sector files containing policy and compliance records and records regarding the video for records responsive to your request. The search produced 47 pages of records consisting of various emails regarding "The Gotaway" video (41 pages, two pages were released in full without redactions), storyboard and shot lists (four pages), and a document containing production details, man-hours, and cost (two pages released without redactions). FOIA Division released to you all 47 pages of records with redactions on 43 pages of records and without redactions of four pages.

We also reviewed each of the alleged deficiencies you identified in your appeal. We address each in turn.

We note at the outset that two of the deficiencies that you identified refer to records that are outside the scope of your request or the FOIA itself. In your appeal you challenged FOIA Division's failure to provide the "video itself." However, your request asked for "all records *related to*" the Gotaway video (emphasis added). It did not seek the video itself, but rather only records *related to* it. We therefore find the video itself to be outside the scope of your original request. Considering a request for those records would not be appropriate on appeal. See *Keenan v. U.S. Dep't of Justice,* No. 94-1909, slip op. at 1 (D.D.C. Nov. 12, 1996) (explaining that a requester "cannot place a request for one search and then, when nothing is found, convert that request into a different search").[3]

You also argued that FOIA Division should have provided the social media posts of the video on YouTube, Facebook, Twitter, and Instagram. An agency, though, need only provide records that it is in control of at the time of the search. *Jones-Edwards v. Nat'l Sec. Agency*, 196 F. App'x 36, 38 (2d Cir. 2006) (concluding that "agency is not obliged to conduct a search of records outside its possession or control"); *Williams v. U.S. Att'ys Off.,* No. 03-674, 2006 WL 717474, at *5 (N.D. Okla. Mar. 16, 2006) (stating that search obligations under FOIA require agency to search "its own records," not "records of third parties"). Posts made on third party websites are not under the control of the agency and therefore outside the scope of FOIA.

We note that public source searches will identify several of those posts. While the agency does not have a responsibility under FOIA to provide access to them, for your convenience, you can view the post on YouTube at https://www.youtube.com/watch?v=46_dsiw3Ly0 and on Facebook at https://www.facebook.com/watch/?v=349437526334302. We add that these posts are particularly difficult for CBP employees to provide as all social media websites are blocked on agency-issued computers.

We do agree with several of the other concerns that you raised, and have conducted additional searches to identify additional potentially responsive records. In particular, you took issue with the reference to Congressional inquiries in the e-mail correspondence that FOIA Division released to you. You argued that "if the Congressional inquiries were made in the form of a record, or if they generated any records in response, those should have been produced." We agree. As such, we contacted staff at the Office of Congressional Affairs (OCA), with expertise and knowledge of their office's programs, operations, and policies, to conduct a search for records that pertain to your request for records of Congressional inquiries about "The Gotaway" video. OCA assists and communicates with members of Congress and their staffs on CBP programs and advises CBP management on congressional matters. It was the most appropriate office to consult regarding your request for records of Congressional inquiries. OCA Staff conducted a

[3] We additionally note that "an agency need not respond to a FOIA request for copies of documents where the agency itself has provided an alternative form of access." *Martinez v. Bureau of Prisons*, 444 F.3d 620, 624 (D.C. Cir. 2006) (quoting *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57 (D.C. Cir. 1990)). In such circumstances, the agency continues to uphold the policy goals of the FOIA and "is not seeking to mask its processes or functions from public scrutiny." *SDC Development Corp. v. Mathews*, 542 F.2d 1116, 1120 (9th Cir. 1976). In this case, as noted, the video itself is accessible via social media.

search of their correspondence tracking system, which tracks all Congressional correspondence, for any records responsive your request for records of Congressional inquiries about "The Gotaway" video. The new search produced no records responsive to your request.

You also argued that FOIA Division should have produced four other record types in response to your request: "all photographs, video, and other records generated in the creation of 'The Gotaway,' regardless of whether they were ultimately included in the final video itself," records related to the decision to tag conservative media outlets in the initial social media posts featuring the video, records indicating whether any CBP employee was admonished, warned, or disciplined in relation to the video, and records related to the decision to remove the video from social media. We contacted USBP staff, including El Centro Sector staff, with expertise and knowledge of their office's programs, operations, and policies, to conduct an additional search for records responsive to your request. The search produced no additional records responsive to your request. In this regard, after conducting an additional search, USBP staff indicated that all records responsive to your request were provided, and there are no additional records responsive to your request.

In conclusion, FOIA Division did not conduct a complete and adequate search for records responsive to your request. Although FOIA Division contacted USBP, the most appropriate office to conduct a search for records pertaining to your request as it was the most likely source of records responsive to your request, and consulted with subject matter experts at this office with the search producing 47 pages of records responsive to your request, FOIA Division did not conduct a search regarding your request for records of Congressional inquiries and should have contacted staff at USBP and OCA regarding this part of your request.

In response to your appeal, my office contacted the most appropriate offices to conduct an additional search for records pertaining to your request as these were the most likely sources of records responsive to your request, specifically USBP and OCA, consulting with subject matter experts at these offices. The search of these offices produced no additional responsive records. CBP has conducted an adequate and reasonable search for responsive records. See *Larson v. Dep't of State,* 565 F.3d at 869; *Lechliter v. Rumsfeld,* 182 F. App'x at 115; *Elec. Privacy and Info. Ctr.,* 2018 WL 2324084, at *3; *James Madison Project,* 605 F. Supp. 2d at 108. We affirm the FOIA Division's determination that CBP has records responsive to your request and releasing those responsive records, totaling 47 pages**.**

IV. Right to Judicial Review and Other Remedies

The Freedom of Information Act, particularly Title 5 U.S.C. § 552 (a)(4)(B), provides you with the opportunity to seek judicial review of this administrative appeal. You may institute judicial review in the United States District Court in the district in which you reside, have a principal place of business, where the agency records are located, or in the United States District Court for the District of Columbia.

Further, the Office of Government Information Services (OGIS) offers mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. If you are requesting access to your own records (which is considered a Privacy Act request), you should know that OGIS does not have the authority to handle requests made under the Privacy Act of 1974. If you wish to contact OGIS, you may email them at ogis@nara.gov or call 202-741-5770 or toll-free 1-877-684-6448.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. 552(c). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

Sincerely,

Matthew Pollack

Matthew Pollack, Chief
Disclosure Law & Judicial Actions Branch

Enclosures (4 pages)